

Dual Office Holding Guide

**Indiana Attorney General
Steve Carter**

Dual Office Holding Guide

Who should read this guide?

Public servants who are thinking of taking on a second public service position should read this guide with their attorneys. Under Indiana law, some public servants cannot legally serve in more than one public service position at any given time. This violation is often called “dual office holding.”

This guide urges all readers to seek legal advice from an attorney before deciding to accept a second public service position. For state government officials, such officials should discuss their particular fact situation with their own attorneys before seeking an opinion from the Indiana Attorney General.

Why is an understanding of dual office holding important?

The Indiana Constitution prohibits dual office holding. When a person violates the constitutional and statutory provisions that govern dual office holding, the person may, in some instances, lose his or her former official position, commit the Class D felony of conflict of interest, or be removed from his or her official position.

How may this guide help me?

This guide sets out the questions a person should ask to determine whether a dual office holding violation exists. This guide also provides a comprehensive list of citations to Indiana cases and Attorney General opinions that have previously determined whether dual holding of particular positions violates Indiana law. The four-step analysis set out below will help you determine whether accepting a second public service position violates law.

What should I ask to determine whether a second public service position violates law?

There are four questions to answer:

1. Are the positions lucrative offices within the meaning of Indiana Constitution Article 2, Section 9?
2. Do the positions violate Indiana Constitution Article 3, Section 1’s separation of powers doctrine?
3. Are the positions incompatible with each other in that they create a conflict of interest or go against public policy?
4. Are there any other local ordinances or regulations that apply?

What is a lucrative office within the meaning of Article 2, Section 9?

Article 2, Section 9 of the Indiana Constitution states:

No person holding a lucrative office or appointment under the United States or under this State is eligible to a seat in the General Assembly; and no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution. Offices in the militia to which there is attached no annual salary shall not be deemed lucrative.

A person holds a lucrative office under this statute when he or she holds title to an office in which he or she is authorized to exercise some of the State's sovereign power and where the person is entitled to compensation. Book v. State Office Building Commission, 149 N.E.2d 273, 279 (Ind. 1958). Essentially, if state law grants any of the State's power (i.e., eminent domain, prosecution, taxation) to a public service position and the person holding such public service position is entitled to get any amount of money for serving in that public service position, then the public service position is considered a lucrative office for purposes of Article 2, Section 9. The office is considered lucrative even if a person chooses not to accept compensation as long as the person is entitled to the pay affixed to the performance of the office's duties. Dailey v. State, 8 Blackf. 329 (Ind. 1846). Such compensation can be salary or per diem (per day). Only pure reimbursement does not constitute compensation.

What if both public service positions are lucrative offices?

If both public service positions are lucrative offices, then there is a violation of Article 2, Section 9's prohibition against dual office holding. This means that a person may not hold both offices at the same time and this ends analysis of the problem. If, on the other hand, you determine that one or both public service positions aren't lucrative offices, then you will need to ask questions 2 through 4.

Below are two lists. One list shows public service positions that are lucrative offices and the other shows public service positions that are not lucrative offices for purposes of dual office holding. Be aware that the law that existed for earlier decisions may be different than the law as it exists today. While the Indiana Supreme Court or a former Attorney General may have concluded a particular public service position is not a lucrative office in a past opinion, the Indiana Supreme Court or another Attorney General may determine the particular public service position to be a lucrative office at a future date. That is why it is important to do the analysis described above rather than rely solely on the lists below.

Lucrative offices:

- Alcoholic beverage board member: 1951 Op.Atty.Gen. No. 78.
- Armed forces officer (federal): 1942 Op.Atty.Gen. p. 76.
- Attorney General: State ex rel. Steers v. Holovachka, 142 N.E.2d 593, 602 (Ind. 1957).
- Circuit court judge: 1942 Op.Atty.Gen. p. 76.
- City clerk treasurer: Wilson v. Niesse, 244 N.E.2d 436, 437 (Ind. 1969).
- City council member: 1991 Op.Atty.Gen. No. 91-14.
- City judge: 1960 Op.Atty.Gen. No. 45.
- City mayor: Howard v. Shoemaker, 35 Ind. 111 (1871); 1967 Op.Atty.Gen. No. 22; 1962 Op.Atty.Gen. No. 67; 1942 Op.Atty.Gen. p. 88; 1949 Op.Atty.Gen. No. 6.
- City sanitary district board member: 1988 Op.Atty.Gen. No. 88-1.
- City school board member: 1951 Op.Atty.Gen. No. 72.
- Controller of South Bend Public Transportation Corporation: 1968 Op.Atty.Gen. No. 4.
- Colonel of volunteers: Kerr v. Jones, 19 Ind. 351 (Ind. 1862); 1942 Op.Atty.Gen. p. 76.
- County auditor: State ex rel. Cornwell v. Allen, 21 Ind. 516 (Ind. 1863).
- County board of public welfare member: 1957 Op.Atty.Gen. No. 12.

- County board of registration member: 1989 Op.Atty.Gen. No. 89-7; 1991 Op.Atty.Gen. No. 91-14.
- County commissioner: Dailey v. State, 8 Blackf. 329 (Ind. 1846); 1957 Op.Atty.Gen. No. 13; 1962 Op.Atty.Gen. No. 67.
- County coronor: 1988 Op.Atty.Gen. No. 88-12; 1989 Op.Atty.Gen. No. 89-4.
- County council member: 1951 Op.Atty.Gen. No. 78.
- County deputy auditorship: Sharp v. State, 99 N.E. 1072, 1074 (Ind. App. 1912); Wells v. State ex rel. Peden, 94 N.E. 321, 323 (Ind. 1911).
- County director of public welfare: 1936 Op.Atty.Gen. p. 155.
- County election board member: 1981 Op.Atty.Gen. No. 81-9; 1961 Op.Atty.Gen. No. 30; 1988 Op.Atty.Gen. No. 88-5; 1987-1988 Op.Atty.Gen. No. 88-5.
- County health officer: 1967 Op.Atty.Gen. No. 29; 1987-1988 Op.Atty.Gen. No. 88-12.
- County highway superintendent: 1988 Op.Atty.Gen. No. 88-1.
- County highway supervisor: 1967 Op.Atty.Gen. No. 39.
- County Plan Commission member: 1954 Op.Atty.Gen. No. 70.
- County recorder: Dailey v. State, 8 Blackf. 329 (Ind. 1946).
- County surveyor: 1917-1920 Op.Atty.Gen. p. 78; 1933 Op.Atty.Gen. p. 254.
- County welfare department investigator: 1936 Op.Atty.Gen. No. 412.
- Deputies of lucrative office holders: Wells v. State ex rel. Peden, 94 N.E. 321, 322 (Ind. 1911); 1980 Op.Atty.Gen. No. 80-3.
- Deputy auditor: Wells v. State ex rel. Peden, 94 N.E. 321, 323 (Ind. 1911); Sharp v. State, 99 N.E. 1072, 1075 (Ind. App. 1912); 1962 Op.Atty.Gen. No. 15.
- Deputy clerk of the Circuit Court: Wilson v. Niesse, 24 N.E.2d 436, 437 (Ind. 1969).
- Deputy gas inspector: 1930 Op.Atty.Gen. p. 747.
- Deputy insurance commissioner: 1947 Op.Atty.Gen. No. 40.
- Deputy mayor: 1981 Op.Atty.Gen. No. 81-9.
- Deputy postmaster (if annual compensation exceeded \$90): Bishop v. State ex rel. Griner, 48 N.E. 1038, 1041 (Ind. 1898); 1907-1908 Op.Atty.Gen. p. 442.
- Deputy prosecuting attorney: 1960 Op.Atty.Gen. No. 9.
- Deputy registration officer: 1962 Op.Atty.Gen. No. 15.
- Deputy secretary of state: 1929-1930 Op.Atty.Gen. p. 78.
- Deputy sheriff: 1962 Op.Atty.Gen. No. 15.
- Deputy town marshal: 1980 Op.Atty.Gen. No. 80-3.
- Deputy township assessor: 1917-1920 Op.Atty.Gen. p. 78.
- Deputy township trustee: 1962 Op.Atty.Gen. No. 15.
- General Assembly membership: Indiana Constitution Article 4, Section 30; 1938 Op.Atty.Gen. p. 270; 1944 Op.Atty.Gen. No. 110; 1953 Op.Atty.Gen. No. 96; 1954 Op.Atty.Gen. No. 70; 1960 Op.Atty.Gen. No. 9; 1961 Op.Atty.Gen. No. 7; 1961 Op.Atty.Gen. No. 18; 1967 Op.Atty.Gen. No. 1.
- Health officer: 1927 Op.Atty.Gen. p. 248; 1988 Op.Atty.Gen. No. 88-12.
- Indiana conservation department game warden: 1930 Op.Atty.Gen. p. 745.
- Justice of the Peace: State ex rel. Kopinski v. Grzeskowiak, 59 N.E.2d 110, 111 (Ind. 1945).
- Muscatatuck Colony trustees and superintendent: 1938 Op.Atty.Gen. p. 270.
- Northern Indiana Childrens Hospital board of trustees member: 1949 Op.Atty.Gen. No. 98.

- Notary public: Sharp v. State, 9 N.E. 1072, 1074 (Ind. App. 1912); 1907-1908 Op.Atty.Gen. p. 467; 1917 Op.Atty.Gen. p. 49; 1917-1920 Op.Atty.Gen. p. 78; 1920 Op.Atty.Gen. p. 102; 1923-1924 Op.Atty.Gen. p. 14; 1957 Op.Atty.Gen. No. 12.
- Prison director: Howard v. Shoemaker, 35 Ind. 111 (Ind. 1871); State ex rel. Platt v. Kirk, 44 Ind. 401 (Ind. 1873).
- Probation officer: 1936 Op.Atty.Gen. p. 155.
- Prosecuting attorney: State ex rel. Steers v. Holovachka, 142 N.E.2d 593, 602 (Ind. 1957); 1930 Op.Atty.Gen. p. 747.
- Public Employees Retirement Fund trustee: 1947 Op.Atty.Gen. No. 40.
- Public Service Commission public counselor: 1947 Op.Atty.Gen. No. 30.
- Representative: Indiana Constitution Article 4, Section 30; 1929-1930 Op.Atty.Gen. p. 78; 1961 Op.Atty.Gen. No. 18; 1934 Op.Atty.Gen. p. 334; 1953 Op.Atty.Gen. No. 26.
- Rural mail carrier: 1907-1908 Op.Atty.Gen. p. 467.
- Sanitary district trustee: 1942 Op.Atty.Gen. p. 88.
- Sanitary engineer: 1997 Op.Atty.Gen. No. 1.
- School board member: 1967 Op.Atty.Gen. No. 29; 1991 Op.Atty.Gen. No. 91-14.
- School commissioners board: 1991 Op.Atty.Gen. No. 91-14.
- School trustee: Wells v. State ex rel. Peden, 94 N.E. 321 (Ind. 1911); Chambers v. State, ex rel. Barnard, 26 N.E. 893 (Ind. 1891); 1922 Op.Atty.Gen. p. 682; 1967 Op.Atty.Gen. No. 39; 1951 Op.Atty.Gen. No. 72; 1966 Op.Atty.Gen. No. 33; 1989 Op.Atty.Gen. No. 89-7.
- Senator: Indiana Constitution Article 4, Section 30; 1929-1930 Op.Atty.Gen. p. 78; 1961 Op.Atty. Gen. No. 18.
- State Board of Tax Commissioners member: 1934 Op.Atty.Gen. p. 334.
- State Fair Board member: 1953 Op.Atty.Gen. No. 96.
- Supreme Court reporter: 1942 Op.Atty.Gen. p. 76.
- Teachers' retirement fund board of trustees member: 1961 Op.Atty.Gen. No. 18.
- Toll bridge commission member: 1951 Op.Atty.Gen. No. 72.
- Town board of trustees member: Gaskin v. Beier, 622 N.E.2d 524, 528 (Ind. App. 1993); 1989 Op.Atty.Gen. No. 89-4.
- Town board member: 1980 Op.Atty.Gen. No. 80-3; 1987-1988 Op.Atty.Gen. No. 88-2.
- Township advisory board members: Pipe Creek School Township v. Hawkins, 97 N.E. 936, 937 (Ind. App. 1912); 1987-1988 Op.Atty.Gen. No. 88-2.
- Township trustee: Bishop v. State ex rel. Griner, 48 N.E. 1038, 1041 (Ind. 1898); Foltz v. Kerlin, 4 N.E. 439 (Ind. 1886); 1935 Op.Atty.Gen. p. 333; 1949 Op.Atty.Gen. No. 57; 1961 Op.Atty.Gen. No. 30.
- Trustee for the Institute for the Education of the Deaf and Dumb: Chambers v. State, ex rel. Barnard, 26 N.E. 893 (Ind. 1891).
- United States deputy game warden: 1930 Op.Atty.Gen. p. 745; 1932 Op.Atty.Gen. p. 462.
- United States marshal: 1935 Op.Atty.Gen. p. 333.
- Utility service board members: Common Council of City of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 733 (Ind. App. 1982).
- Voter registration board trustee: 1989 Op.Atty.Gen. No. 89-7.

Additional lucrative offices (by statute):

- Candidates for elected office may not be appointed county election board members, proxy of record, or alternate proxy of record. Indiana Code Section 3-6-5-3.
- Members of the commission to regulate plumbers, except for the state department of health representative, may not hold another elective or appointive state or federal office. Indiana Code Section 25-28.5-1-4.
- No lucrative office holder under the United States or State of Indiana to whom Article 2, Section 9 applies, may serve as a notary public. Indiana Code Section 33-16-2-7.

Public service positions that are not lucrative offices:

- Appointed deputy of a judicial circuit officer: Indiana Code Section 5-6-4-3.
- Appointed deputy of a political subdivision officer: Indiana Code Section 5-6-4-3.
- Attorney employed by county executive: Indiana Code Section 36-2-2-30.
- Attorney employed by county fiscal body: Indiana Code Section 36-2-3-10.
- Attorney for board of zoning appeals: 1997 Op.Atty.Gen. No. 97-1.
- Attorney for the metropolitan planning commission: 1997 Op.Atty.Gen. No. 97-1.
- Barber inspector: State ex rel. Black v. Burch, 80 N.E.2d 294, 297 (Ind. 1948).
- Board of public works member: 1922 Op.Atty.Gen. p. 682.
- Board of public works and safety clerk: 1947 Op.Atty.Gen. No. 24.
- Building commission membership: Book v. State Office Building Commission, 149 N.E.2d 273, 289 (Ind. 1958).
- City clerk: 1947 Op.Atty.Gen. No. 24.
- City councilman: State ex rel. Platt v. Kirk, 44 Ind. 401 (Ind. 1873); 1917 Op.Atty.Gen. p. 49; 1923-1924 Op.Atty.Gen. p. 649; 1944 Op.Atty.Gen. No. 110; 1949 Op.Atty.Gen. No. 6; 1949 Op.Atty.Gen. No. 29.
- City employee other than an elected or appointed public officer: Indiana Code Section 36-4-4-2.
- City civil engineer: 1921-1922 Op.Atty.Gen. p. 365; 1934 Op.Atty.Gen. p. 500; 1997 Op.Atty.Gen. No. 1.
- City engineer: 1936 Op.Atty.Gen. p. 438; 1934 Op.Atty.Gen. p. 500.
- City fireman: City of Peru v. State ex rel. McGuire, 199 N.E. 151, 153 (Ind. 1936); 1964 Op.Atty.Gen. No. 56.
- City planning commission secretary: 1921-1922 Op.Atty.Gen. p. 365.
- City police department members: Indiana Code Section 36-8-3-12; Kirmse v. City of Gary, 51 N.E.2d 883, 884 (Ind. App. 1944); State ex rel. Palm v. City of Brazil, 73 N.E.2d 485, 488 (Ind. 1947); 1961 Op.Atty.Gen. No. 4.
- Committee membership: Branham v. Lange, 16 Ind. 497 (Ind. 1861).
- County attorney: 1964 Op.Atty.Gen. No. 14.
- County civil engineer: 1997 Op.Atty.Gen. No. 1.
- County park manager: Mosby v. Board of Commissioners of Vanderburgh County, 186 N.E.2d 18, 22 (Ind. App. 1962).
- County political party chairman: State ex rel. Kiser v. Millspaugh, 175 N.E.2d 13, 15 (Ind. 1961).
- Deputy inspector under the direction of the state commissioner: Freyermuth v. State ex rel. Burns, 2 N.E.2d 399, 404 (Ind. 1936).
- Deputy internal revenue collector: 1917 Op.Atty.Gen. p. 49.
- Egg Board executive secretary: 1967 Op.Atty.Gen. No. 11.

- Fire department members, including volunteer fire department members: Indiana Code Section 36-8-3-12.
- Firemen: City of Huntington v. Fisher, 40 N.E.2d 699, 700 (Ind. 1942); State ex rel. Palm v. City of Brazil, 73 N.E.2d 485, 488 (Ind. 1947); 1946 Op. Atty. Gen. No. 72.
- Housing Authority executive director: 1967 Op. Atty. Gen. No. 1.
- Indiana Flood Control and Water Resource Commission secretary: State ex rel. Black v. Burch, 80 N.E.2d 294, 296 (Ind. 1948); 1947 Op. Atty. Gen. No. 30.
- Investigator for a prosecuting attorney: 1961 Op. Atty. Gen. No. 7.
- Judge pro tempore: 1951 Op. Atty. Gen. No. 33.
- Knox-Center Library Board member: 1960 Op. Atty. Gen. No. 45.
- Militia positions where no compensation is attached: Indiana Constitution Article 2, Section 9.
- Motor Vehicle Department director: State ex rel. Black v. Burch, 80 N.E.2d 294, 296 (Ind. 1948).
- National guard first lieutenant: 1937 Op. Atty. Gen. p. 252.
- Northern Indiana Childrens Hospital active staff member: 1949 Op. Atty. Gen. No. 98.
- Police officer: Roth v. State, 63 N.E. 460, 468-69 (Ind. 1902); City of Huntington v. Fisher, 40 N.E.2d 699, 700 (Ind. 1942); Crooke v. Lugar, 354 N.E.2d 755, 761 (Ind. App. 1976); Foley v. Consolidated City of Indianapolis, 421 N.E.2d 1160, 1164 (Ind. App. 1981); Wencke v. City of Indianapolis, 429 N.E.2d 295, 297 (Ind. App. 1981); 1946 Op. Atty. Gen. No. 72; 1966 Op. Atty. Gen. No. 39.
- Probation officer: 1946 Op. Atty. Gen. No. 72; 1961 Op. Atty. Gen. No. 25.
- Professor at Indiana University: 1933 Op. Atty. Gen. p. 170.
- Rural mail carrier: 1920 Op. Atty. Gen. p. 102.
- Safety board members: Indiana Code Section 36-8-3-12.
- School corporation attendance officer: 1946 Op. Atty. Gen. No. 275.
- School corporation trustee, as to township trustees: 1949 Op. Atty. Gen. No. 57.
- Senior judge of the Court of Appeals: McCullough v. McCullough, 705 N.E.2d 190, 197 (Ind. App. 1999).
- Special judge: 1951 Op. Atty. Gen. No. 33.
- Solid waste management district controller: Indiana Code Section 13-21-3-10(b).
- Teacher: Indiana Code Section 20-6.1-6-14; 1938 Op. Atty. Gen. p. 424; 1953 Op. Atty. Gen. No. 26.
- Town deputy marshal: Gaskin v. Beier, 622 N.E.2d 524, 529 (Ind. App. 1993).
- Town police department members: Indiana Code Section 36-8-3-12.
- Town trustee: 1917 Op. Atty. Gen. p. 49; 1927-1928 Op. Atty. Gen. p. 248; 1949 Op. Atty. Gen. No. 57.
- Township police department members: Indiana Code Section 36-8-3-12.
- Where a public officer ex officio performs the duties of another office: State ex rel. McManamon v. Felger, 102 N.E.2d 369, 370 (Ind. 1951); 1987-1988 Op. Atty. Gen. No. 88-5; 1991 Op. Atty. Gen. No. 91-19.

If a person holds two lucrative offices in violation of Article 2, Section 9, then what happens?

If a lucrative state office holder accepts a second lucrative state office, then the acceptance of the second lucrative state office automatically vacates the first office.

Chambers v. State, ex rel. Barnard, 26 N.E. 893, 894 (Ind. 1891); Bishop v. State ex rel. Griner, 48 N.E. 1038, 1041 (Ind. 1898); Wells v. State ex rel. Peden, 94 N.E. 321, 323 (Ind. 1911); 1947 Op. Atty. Gen. No. 30; 1938 Op. Atty. Gen. p. 270; 1933 Op. Atty. Gen. p. 254; 1951 Op. Atty. Gen. No. 77; 1951 Op. Atty. Gen. No. 234; 1935 Op. Atty. Gen. p. 333. Thus, the first office becomes vacant and a successor will need to be appointed or elected, depending on the law applicable to the office. Gosman v. State, 6 N.E. 349, 353 (Ind. 1886).

Where a person is appointed and accepts a lucrative state office and continues to hold a lucrative federal office, the state court may expel that person from state office if the person persists in holding the lucrative federal office. Foltz v. Kerlin, 4 N.E. 439, 440-41 (Ind. 1886); 1987-88 Op. Atty. Gen. No. 87-17.

What is a violation of the separation of powers doctrine within the meaning of Article 3, Section 1?

Article 3, Section 1 of the Indiana Constitution states:

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

The separation of powers doctrine serves to rid each of the separate departments of state government from any control or influence by either of the other state government departments. State ex rel. Black v. Burch, 80 N.E.2d 294, 300-03 (Ind. 1948); Schloer v. Moran, 482 N.E.2d 460, 463 (Ind. 1985); Phelps v. Sybinsky, 736 N.E.2d 809, 815 (Ind. App. 2000). If a person charged with official duties in one state government department may be employed to perform duties, official or otherwise, in another department, the door is opened to influence and control by the employing department. Burch at 300-03. Thus, even if a person is not a dual office holder, if that person is executing functions of public office in more than one state government department, that person violates the separation of powers doctrine. See 1983-84 Op. Atty. Gen. No. 83-5.

If a person is not a dual office holder and is not in violation of the separation of powers doctrine, what other factors may prevent the person from serving in more than one public service position?

A person cannot serve in more than one public service position if the positions are incompatible with each other in that they create a conflict of interest or go against public policy, or if local ordinances or regulations prohibit such multiple position holding.

Generally, a public officer is prohibited from holding two incompatible offices at the same time. Offices are generally held to be incompatible where a conflict of interests exists, as where one office is subordinate to the other office and subject to some degree to the supervisory powers of its incumbent, or where the functions of the two offices are inherently inconsistent or repugnant. 1951 Op. Atty. Gen. No. 77; 1954 Op. Atty. Gen. No. 70; 1967 Op. Atty. Gen. No. 11. See also Schloer v. Moran, 482 N.E.2d 460, 464 (Ind.

1985). When such incompatibility exists, the acceptance of the latter office vacates the first office. 1954 Op.Atty.Gen. No. 70.

Conflict of interest is also a crime. When a public servant violates Indiana Code Section 35-44-1-3's provisions, that person commits conflict of interest, which is a Class D felony. Further, even if there is no injury or actual benefit from the conflict of interest, the law does not permit public servants to place themselves in a situation where they may be tempted to do wrong. Cheney v. Unroe, 77 N.E. 1041, 1042 (Ind. 1906); 1989 Op.Atty.Gen. No. 89-3. To deter conflict of interest the courts hold all such conflicting employment void. Id.; Pipe Creek School Township v. Hawkins, 97 N.E. 936, 937 (Ind. App. 1912).

Whether these final considerations are violated will differ with each fact situation. Also, there may or may not be any local ordinances or regulations that govern whether a particular public servant may serve in another public service position.

The public servant's appointing authority determines whether such positions are incompatible with each other in that they either create a conflict of interest or violate public policy. See Gaskin v. Beier, 622 N.E.2d 524, 530 (Ind. App. 1993). Public policy is determined from a consideration of the Constitution, statutes, practice of the state's administrative officers, and the decisions of the Indiana Supreme Court. See Hogston v. Bell, 112 N.E. 883, 886 (Ind. 1916).

Past Attorney General opinions decline to answer these final questions for the appointing authority absent blatant conflicts of interest or violations of public policy. 1936 Op.Atty.Gen. p. 412; 1960 Op.Atty.Gen. No. 9; 1961 Op.Atty.Gen. No. 4; 1967 Op.Atty.Gen. No. 11; 1987-88 Op.Atty.Gen. No. 87-3; 1989 Op.Atty.Gen. No. 3.

What are the possible consequences of running for another office or holding another office?

As described earlier, the acceptance of one lucrative office automatically vacates the former office. So one consequence of dual office holding is that the first office will become vacant.

Also, if a person unlawfully holds or exercises a public office in Indiana, or if a public officer does an act, such as accept another lucrative office, which works to forfeit the officer's office, then a court may determine another person's right to hold the office. Indiana Code Section 34-17-1-1.

In such a case, the plaintiff must demonstrate personal interest in right or title to the office. Brenner v. Powers, 584 N.E.2d 569, 576 (Ind. App. 1992). And quo warranto is the proper remedy for determination of a party's right to hold office. State ex rel. Brown v. Circuit Court of Marion County, 430 N.E.2d 786, 787 (Ind. 1982).

As a result of such a court determination, a de facto office holder (the officer who was found to have wrongly held the office) may be ordered to leave office and a de jure office holder (the rightful office holder) will be named to hold office. State ex rel. Bishop v. Crowe, 50 N.E. 471, 473-74 (Ind. 1898). However the de facto officer's acts performed before being ousted from office are valid because, as a public policy, the courts have determined that the public should not suffer from the acts of an officer who may have had defective title or no title at all. Id. at 474; State v. Sutherlin, 75 N.E. 642, 646 (Ind. 1905).

Finally, when an office holder runs for another office, he or she should be aware of the Hatch Act found in 5 U.S.C. §§1501-1508. The Act proscribes the following activity:

A state or local officer or employee may not (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office; (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or (3) be a candidate for elective office.

5 U.S.C. §1502(a). The Hatch Act restricts the political activity of people employed by state, county, or municipal executive agencies that are affiliated with programs financed in whole or in part by federal loans or grants. However, the Hatch Act does not restrict the political activity of people employed by research or educational institutions, or agencies that receive financial support in whole or in part by states or their political subdivisions, or religious, philanthropic, or cultural organizations. See 5 U.S.C. §§1501-1508.

Further, 5 U.S.C. §1502(a)(3) does not apply to (1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor; (2) the mayor of a city; (3) a duly elected head of an executive department of a state or municipality who is not classified under a State or municipal merit or civil-service system; or (4) an individual holding elective office.

If an officer or employee violates the Hatch Act, the Merit Systems Protection Board may determine that the violation requires the officer or employee to be removed from his or her office or employment.

Within 30 days of notice of this decision, the officer or employee must be removed from office or employment. If removal does not occur, the Board may order the withholding of federal loans or grants from the agency that received notice. The withheld amount is equal to 2 years' pay at the rate that the officer or employee was receiving at the time of the violation.

Further, the officer or employee may not be appointed within 18 months of his or her removal to an office or employment within the same State in a State or local agency which does not receive loans or grants from a Federal agency. If such an appointment does occur, the Board may order the withholding be made from that State or local agency.

Here are additional resources:

1. Calebresi, Steven and Larsen, Joan. "One Person, One Office: Separation of Powers or Separation of Personnel?" 79 Cornell L.Rev. 1045. July 1994.
2. Indiana Attorney General Steve Carter's internet website:
<http://www.state.in.us/attorneygeneral/>
3. Modisett, Jeffrey. "Indiana Dual Office Holding Guide." July 1999.